DIVISION II

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
JOHN B. ROBBINS, JUDGE

CA 05-1274

JUNE 21, 2006

APPEAL FROM THE LONOKE COUNTY CIRCUIT COURT
[NO. CV-2004-323]

HONORABLE PHILLIP THOMAS WHITEAKER, JUDGE

AFFIRMED

WILLIAM HOLDEN
APPELLANT

V.

HAROLD DEAN CLOUD, et al.
APPELLEES

This case concerns a dispute among family members regarding use of an underground irrigation pipeline system. Appellant William Holden appeals an order entered by the Lonoke County Circuit Court granting appellees, Harold Dean Cloud and his wife Virginia Cloud, an easement by agreement under appellant's parcel of land.[1] Appellant argues that the trial court's decision is clearly against the preponderance of the evidence. We disagree and affirm.

The facts in this case are very nearly undisputed. For many years, dating back to the 1960s, the land at issue was held almost entirely by two brothers, Marion and Bernard Isbell, with appellant (Marion's stepson) and appellee Virginia (Marion's daughter and appellant's half-sister) having some ownership interest in one parcel. The land was farmed for various crops. Appellant became the overall farm manager in the late 1960s. The property was

[1]The Clouds' tenant farmer, Martin Underwood, was also named as a plaintiff and is technically a prevailing party and an appellee. However, for ease of reference, we refer only to the Clouds, title holders of the land in question.

managed as a single farming operation, under which an underground irrigation pipeline system was installed in 1977 to water the crops.

In 1996, Marion conveyed his interest in the northernmost parcel (hereinafter "Parcel A") to appellees Harold Dean Cloud and his wife Virginia. Parcel A contained the "home place." Appellant acquired his interest in the middle parcel (hereinafter "Parcel B") from his Uncle Bernard Isbell in or around 1997. Another parcel was situated south of Parcel B, across a road, which was held in part by Bernard, in part by appellee Virginia, and in part by appellant. After some conveyances of interests in July 2000, appellees acquired the entirety of this parcel (hereinafter "Parcel C"). The Isbell brothers retired from farming in or around 2000. The result was that appellant owned a piece of farm land in between two parcels owned by the Clouds. The irrigation pipe was situated from a well on Parcel A, pipelined under the soil across Parcel B, and ended on Parcel C. There were water wells on Parcels A and C, but not B. An outlet to the surface (also known as a "riser") existed on appellant's Parcel B.

In 2001, appellant said that he informed his sister Virginia that he did not want her to use the irrigation system under his land, as he had ceased farming at that time. Virginia denied that appellant ever told her to stop using the irrigation system. Appellant admittedly interrupted the Clouds' use of the system in June 2004, by taking the cap off the riser on Parcel B, which allowed the water to flow out and into a drainage ditch on his land. This act led to the present cause of action.

The Clouds filed a complaint in circuit court shortly thereafter, seeking temporary and permanent injunctions and asking for the establishment of an easement by agreement or prescription, along with damages and attorney's fees. Appellant defended on the basis that the statute of frauds prevented any alteration in the ownership rights regarding this land, and

furthermore, that there was a failure of proof regarding any purported easement. After a bench trial in June 2005, the trial court found that the parties' predecessors had orally agreed to an easement for the use of the irrigation system and that this precluded the application of the statute of frauds. The trial court also found that the overwhelming evidence established that the easement was mutually beneficial, used, and recognized since 1977 and not abandoned. The trial court cited to *Higgins v. Blankenship*, 270 Ark. 370, 605 S.W.2d 493 (Ark. App. 1980), in its order, which case held that as a general rule an easement must be in writing but that an oral grant will be upheld when it is accompanied by consideration, action in reliance on the grant, and by the grantee's being permitted the granted use. A timely notice of appeal followed.

On appeal, appellant lodges the same arguments for reversal that he posited to the trial court. In bench trials such as this, the standard of review on appeal is not whether there is substantial evidence to support the finding of the court, but whether the judge's findings were clearly erroneous or clearly against the preponderance of the evidence. Ark. R. Civ .P. 52(a) (2004); *Reding v. Wagner*, 350 Ark. 322, 86 S.W.3d 386 (2002); *Shelter Mut. Ins. Co. v. Kennedy*, 347 Ark. 184, 60 S.W.3d 458 (2001). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with a firm conviction that a mistake has been committed. *Sharp v. State*, 350 Ark. 529, 88 S.W.3d 848 (2002). Disputed facts and determinations of credibility are within the province of the fact-finder. *Sharp, supra*; *Pre-Paid Solutions, Inc. v. City of Little Rock*, 343 Ark. 317, 34 S.W.3d 360 (2001). Because we disagree with appellant's contention that the trial court clearly erred, we affirm.

In this case, the testimony at the June 16, 2005 trial revealed the following more detailed opinions about what occurred between the parties. Appellee Harold Dean Cloud

testified that brothers Marion and Bernard Isbell, when they owned the bulk of the land, used the pipeline under a "brotherly agreement," although Harold did not know of any specific written or oral commemoration of that agreement. Harold believed that Bernard, and later appellant, benefitted by having use of the water for crops on Parcel B. Harold said that the family dispute arose on June 12, 2004, when the cover on the riser existing on Parcel B was removed. Harold testified that between the time that appellant acquired Parcel B until this interruption problem in 2004, he and his wife continued to use the pipeline for farming every year without any discussion from appellant.

Virginia Cloud said that her parents deeded her Parcel A in 1996, and she had owned a fractional interest in Parcel C since 1976 until full ownership vested in her in 2000. Virginia stated that she did not remember appellant ever telling her not to use the irrigation system. Virginia said that the last time she talked to appellant was in July 2000 when she acquired full ownership of Parcel C. The Clouds' tenant farmer, Martin, testified that he had farmed this land since the early 1990s and had used the pipeline over the years. Martin confirmed that appellant quit farming the middle parcel in 2000. However, Martin said that he continued to use the pipeline until June 2004.

Appellant William Holden testified that he, in his capacity as the family farm manager over nearly 1000 acres, designed the pipeline system in cooperation with the Soil Conservation Service and testified that it was constructed in 1977 and used and maintained for many years thereafter. He agreed that he, Marion, and Bernard installed irrigation pipe as part of that farming operation, but that "there was no agreement" about the future use of that pipe, and "there were no strings attached either way." Appellant stated that the pipe benefitted Parcel B because it was the only way to water it. Appellant confirmed that the agreement among the three of them in 1977 was that an irrigation pipe would connect to the

well on Parcel A belonging to Marion, the pipe would run under Bernard's Parcel B with a riser on that parcel, and then connect to a well situated on Parcel C, owned by several family members, including himself. Appellant summarized, "This wasn't something that we sat down and went over. I managed it and they never objected to what I did." Appellant believed that he had the right to revoke his permission to use the pipeline, which he said he verbally rescinded to his sister in 2001.

Appellant moved for a directed verdict at the appropriate times on the basis that the petitioners had failed to show any agreement, oral or in writing, or any consideration between owners regarding use of this pipeline. Appellees responded by citing to *Higgins v. Blankenship, supra*, concerning easements by oral agreement. The trial judge denied the motion as to an easement by agreement, but granted a directed verdict as to an easement by prescription. He took the matter under advisement as to an easement by agreement. In an order entered on August 24, 2005, the trial judge found in favor of appellees, and this appeal followed.

Appellant contends that there is a complete absence of proof that an actual agreement for an easement existed regarding this pipeline, and furthermore that there was no consideration given to the grantor or reliance by the grantee. We disagree. While the original land owners (the Isbell brothers, and partially appellant and appellees regarding Parcel C) did not testify as to any explicit agreement, appellant himself managed the property and took the lead role in having the irrigation system installed. Appellant was the primary witness providing evidence that the irrigation system was an agreed venture that benefitted and burdened all the farming land, and in particular Parcels A, B, and C. Parcel B had no access to a well other than through the subject irrigation pipeline, which constitutes the benefit bestowed on the encumbered property. The pipeline was used from and after 1977

for more than twenty years. The undisputed testimony was that Marion and Bernard fully agreed to the mutual benefit of having the system installed and upgraded as necessary, under appellant's managerial direction. There was evidence from which the trial court could conclude that an easement by agreement existed regarding this pipeline.

Appellant argues that this situation is not on all fours with *Higgins*, *supra*. The sons of the original landowners in *Higgins* testified that their fathers agreed to the installation and use of a roadway installed upon the burdened land. Appellant contends that in the present situation, no one verified the existence of an explicit verbal agreement. Furthermore, appellant adds that each landowner simply improved his or her own land and did not agree to a perpetual burden for the others' benefit. He asserts that the pipeline was used pursuant to mere permission until he revoked his permission regarding Parcel B, which permission cannot ripen into an easement. We cannot agree that appellant has shown reversible error.

An oral grant of an easement will be upheld where it is accompanied by consideration, action in reliance on the grant, and by the grantee's being permitted the granted use. *See id. See also Chaney v. Martin*, 205 Ark. 962, 171 S.W.2d 961 (1943); *Wynn v. Garland*, 19 Ark. 23 (1857). In *Warren v. Cudd*, 261 Ark. 690, 550 S.W.2d 773 (1977), cited in *Higgins*, the appellants' predecessor in title allowed others to share the cost of a new roadway and gate and acquiesced in their use of the road. The supreme court held that it was not error to find that the rights in the road ripened into an oral easement. Likewise, the actions in this case of appellant spear-heading the installation and maintenance of the entirety of the pipeline system conclusively establishes that the pipeline was an agreed venture, simultaneously benefitting and burdening the respective parcels of land, and establishing an easement for the use thereof. The trial court did not clearly err in so finding.

We affirm.

GLADWIN and BIRD, JJ., agree.